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14 November 1974

NOTE FOR: Director, Joint Computer Support

Harry:

You may recall that there were extended discussions with OJCS and Security on the security/privacy issue regarding computers. It is suggested that your office touch base with the Office of Security and consider whether it would be worthwhile, from a Directorate standpoint, to subscribe to Privacy Journal, with ACLU ties. An informal response will be fine.

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Privacy Journal


An Independent Monthly on Privacy in a Computer Age

P.O. Box 8844 ■ Washington, D.C. 20003 ■ (202) 547-2865

November 1974

WASHINGTON REPORT

The accelerated pace of privacy proposals in Washington this month has brought with them new sources of significant opposition. Most notable was the anticipated floor debates, in both the House and the Senate in late November, on the nation's first general privacy bills.

The legislation, S. 3418 and H.R. 16373, would regulate federal government personal data collection and presumably establish precedents for Congressional regulation of privacy in non-government data banks. (See analysis below.)

■ On the eve of the effective date of an amendment to the 1974 education funding bill guaranteeing privacy of student records, higher education representatives lobbied fiercely to have colleges and universities exempt from the requirement. Meanwhile, eight public interest groups chided the Secretary of Health, Education, and Welfare that HEW wasn't serious about enforcing the legislation. (See details below on this and the following items.)

■ The National Commission for the Review of Federal and State Wiretapping, created by the wiretapping title of the Omnibus Crime Control Act of 1968 to study the effectiveness of electronic surveillance, suddenly found itself fighting for its bureaucratic life because of a staff investigation that found serious abuses of wiretapping by local law enforcement. The threat to the commission's attempted objectivity came from the patriarch of the 1968 act, Sen. John L. McClellan, D.-Ark., who controls government appropriations, sits on the commission and believes in the effectiveness of police wiretapping, study or no study.

IMPORTANT
SUBSCRIPTION NOTICE
ON PAGE 3

■ Co-sponsors of post-Watergate restrictions on Internal Revenue Service information-sharing with other federal agencies (including the White House), Sen. Lowell P. Weicker, R.-Conn., and Rep. Jerry Litton, D.-Mo., emerged from a chat with President Ford convinced that the Administration would support the Weicker-Litton tax return proposals and perhaps withdraw the Administration's alternative bill. The Administration bill, which would allow more IRS information-sharing than the Weicker-Litton bills, was introduced anyway (S. 4116).

■ In a rare exposition of an issue sure to come before the U.S. Supreme Court, an associate justice articulated his concerns about the catch-all category of privacy. William H. Rehnquist said that partially enforced

(Continued on page 6)

The press has successfully challenged a broad-brush law passed in Hawaii last May (Act 45) that says "all law enforcement records relating to the questioning, apprehension, detention, arrest or charging of persons... against whom no conviction is secured, shall be deemed confidential." The intent of the bill was to prevent abuse of arrest information by employers, credit reporting firms and others, but the press said Honolulu police immediately used it to close all arrest files formerly open to the press. One prosecutor wouldn't release names of persons indicted by the grand jury. A state circuit court on the island of Oahu (Honolulu) enjoined enforcement of the act, but it remains in effect on the other islands.

As of October, Florida news media may not disclose the identities of persons wiretapped by police, until the person is indicted, even if the wiretap information is a matter of public record in open court. Gov. Reuben Askew allowed the bill to become law without his signature (Fla. Stat. Sec. 934.091). * * * The Governor's Commission on Privacy and Personal Data (100 Cambridge St., Boston 02202) has prepared a comprehensive digest of all Massachusetts laws relating to personal privacy. * * * The Massachusetts Department of Education has circulated proposed regulations granting access to school records to pupils 14 or older and to parents of children 17 or younger. No outside access would be allowed "without the specific, informed written consent of the student and parent" and pupils and parents would have the right to amplify records. * * * Similar "Fair Information Practices" bills, H. 5803 in Michigan and H.B. 2192 in Pennsylvania, lay dormant in the past legislative sessions.

Gov. Ronald Reagan vetoed AB 1609, a California bill that would have assured bank customers notice before outsiders saw their bank account records. A comparable federal bill is languishing in committee (S. 2200).

The Legislative Service Commission has been ordered by the Ohio legislature to draft proposed privacy legislation for the next session. * * * A committee of the joint Virginia Advisory Legislative Council will make recommendations to the legislature this fall on personal data collection in the commonwealth, pursuant to Senate Resolution 10. * * * Each Louisiana taxpayer will have to attach a copy of his federal return when he submits his state tax return next year, in accord with Act 341, passed in the 1974 legislative session.

QUOTABLE

"While sociologists probe the poor and measure the middle classes with computerized efficiency, the rich remain largely ignored by social scientists and journalists alike."

Kenneth L. Woodward in Newsweek,
October 7, 1974, p. 78.

. . . BY WAY OF EXPLANATION

PRIVACY JOURNAL is an independent monthly newsletter covering privacy issues in a computer age. The newsletter is published in Washington by Robert Ellis Smith, who had been associate director of the Privacy Project of the American Civil Liberties Union and editor of The Privacy Report. Smith, formerly assistant director of the Office for Civil Rights in the U.S. Department of Health, Education, and Welfare, reported on legal and social issues for Newsday, the Detroit Free Press and other newspapers.

The ACLU terminated the Privacy Project in October because of its budgetary crisis. (The September issue was the most recent Privacy Report.)

This is a sample copy. To receive Privacy Journal after this issue you must subscribe for $15 per year.

Ten subscriptions submitted simultaneously (for the same or different addresses) will cost $100; 25 subscriptions will cost $200. An order of $100 or more entitles subscribers to the research services of Privacy Journal, including additional privacy materials (texts of bills, regulations, speeches, etc.) as requested.

In the interests of individual privacy, the mail list used by The Privacy Report was not disseminated outside of the ACLU. Therefore, this first mailing of Privacy Journal was based on other generally available lists of persons and organizations concerned with computerized data collection and its impact on privacy.

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REHNQUIST ON PRIVACY

Announcing himself a "devil's advocate," Associate Supreme Court Justice William H. Rehnquist has spelled out why he feels that "if the balance is struck in favor of 'privacy' some other societal value will suffer" -- like good government or effective law enforcement. The occasion for this rare glimpse of a Supreme Court justice's views on an issue that will increasingly come before the court was the two-part Stephens Lectures at the University of Kansas Law School, September 26-27 (text available from Justice Rehnquist's office, Washington, D. C. 20543).

Turning first to arrest records, Rehnquist said, "To speak of an arrest as a private occurrence seems to me to stretch even the broadest definitions of the idea of privacy beyond the breaking point. But (that) does not mean that an individual has no interest in limiting disclosure or dissemination."

Rehnquist thought an FBI central file of arrest data was proper; "if the fact of arrest is by no means conclusive evidence of wrongdoing, it is considered a relevant factor by law enforcement authorities." Police need "every conceivable bit of relevant information about all of the suspects."

Dissemination of arrest records to private employers is a closer question, the associate justice said. Employers may not distinguish between convictions (guilty) and arrests (no finding of guilt). Instead of sealing crime records, why not educate employers not to discriminate on the basis of them, asked the justice in his first lecture.

In one of those flights of fancy that terrify Supreme Court lawyers, Rehnquist told his audience to imagine the need for the Secret Service to photograph all persons attending political rallies. (Arthur Bremer, after all, showed up in at least one film of a 1972 Wallace rally.) Citizens attending a public rally have no interest in "privacy," said Rehnquist, and the gravity of political assassination "would outweigh the claim to privacy advanced on behalf of innocent spectators at a political rally."

After that bombshell, Rehnquist promised the faculty and students at Kansas more for the next day. He delivered. He complained that "the government is present in the lives of all of us today in a way that would have been inconceivable even 50 years ago." Rather than regulate the personal data collection necessary for government to run its programs, why not discontinue the programs, asked the jurist.

"The applicant (for government benefits) who objects to submitting the information required retains the option to decline participation in the program, although in the real world this may not be a very meaningful option," said Rehnquist.

Nor did he think the government should simply take the word of each applicant for benefits. To do so would mean an abandonment of standards.

And this brought Rehnquist back to arrest data: "The great disadvantage of making the laws any more difficult to enforce than they now are is that it tends to make a sucker or chump out of the citizen who obeys the law." Let a few folks through the express lane with more than eight grocery items and you'll have chaos in the supermarket, said Rehnquist, President Nixon's assistant attorney general for legal counsel who came to the court in 1971 at age 47.

Privacy Law -- A Privacy Journal survey of more than 100 accredited law schools revealed only a handful offering courses in privacy. Among them are Georgetown University Law Center, Washington (Lawrence Baskir); University of Oregon (David B. Frohnmayer); American University, Washington (Legal Aspects of Information Systems, Gerald O'Brien and Harold Petrowitz); Albany, N. Y., Law School (First and Fourteenth Amendment freedoms, Bernard E. Harvith); Brooklyn Law School; Hastings College of Law, University of California, San Francisco (torts seminar); Catholic University of Puerto Rico (torts seminar); University of Virginia (civil rights, David B. Horsky). Other schools offer courses that touch on privacy in torts, constitutional rights or computers and the law. The Center for the Study of Contemporary Issues at Eastern Michigan University, Ypsilanti, is offering an undergraduate course on Privacy in an Open Society (Ronald Westrum). The City University of New York Graduate Center has offered a course on Privacy for the past three years (Robert Laufer, Maxine Wolfe).

Double Jeopardy -- Three years after he was arrested in 1959 in Philadelphia on a morals charge, a Virginia man succeeded in getting a court order expunging the arrest record because the charge was dropped. He then had to pursue his arrest record to state police headquarters in Harrisburg, where he succeeded in having the record expunged several years later. Applying for federal employment in 1960, the man told the government that he had been arrested and the record expunged. The man's problem now is that the Civil Service Commission, the federal government's personnel office, refuses to delete the arrest reference from its files. The commission wrote to him that "no stigma" attaches to a reference to an expunged record. But, the commission referred to the incident as "an offense" and told him no court order could delete information "you voluntarily listed." The man is haunted by the suspicion that the CSC file caused his demotion in 1971.

Wiretapping -- When the government was granted wiretapping authority in 1968, Congressional opponents succeeded only in getting a commission established six years after the effective date to reevaluate the effectiveness of electronic snooping. Like most commissions, the staff of this one took its mandate seriously and swooped down on the New York City area (locale of half of the non-federal taps in the nation) to see whether, in fact, wiretapping helps solve crime.

The staff found evidence of taps authorized by lazy or unscrupulous judges, premature installation of taps, and use of taps where other methods are more effective.

The dynamite report on local wiretapping fell into the hands of Sen. John L. McClellan, D.-Ark., a commission member and prime advocate of prosecutorial wiretapping. He made it clear to the commission staff that its appropriation would cease at the end of this fiscal year if it failed to come up with findings showing the effectiveness of electronic surveillance. Wiretap commission staffers now fear their final report will be a whitewash and their draft report on New York City will never see the light of day.

West Virginia residents find it hard to escape reminders of the computer age: their Social Security numbers appear on their hunting/fishing licenses.

(Continued from page 1)
laws and cumbersome government programs ought to be repealed rather than burdened with privacy and confidentiality safeguards. (See details on page 4.)

PRIVACY BILLS

Aside from the Fair Credit Reporting Act of 1970, there has been no major federal legislation restricting personal information gathering. Now both Houses of the Congress are ready to consider bills that would restrict information-sharing among federal agencies and grant citizens a remedy for unfair or inaccurate data gathering.

The Senate bill, which grew out of Sen. Sam J. Ervin's long-standing concern about government data collection, would create a five-member Federal Privacy Protection Commission to oversee data banks established with federal money.

Each bill passed full committee comfortably, although some federal agencies have complained that the bills would limit their effectiveness and cost them more money. The Ford Administration is seeking significant changes, including abandonment of the privacy commission idea, but will probably support the thrust of the bills.

The vote to watch in the Senate is whether to refer the bill back to the Senate Judiciary Committee, chaired by Sen. James O. Eastland, D.-Miss., a conservative ally of the Administration. It was the Committee on Government Operations, headed by civil libertarian Ervin, that drafted the original bill -- one reason why only government -- not private-sector -- data banks are covered by the bill.

In the House, Rep. John N. Erlenborn, R.-Ill., also a conservative ally of President Ford, will propose amendments on the floor to exempt Civil Service suitability and military promotion files from the bill's coverage. Also, Rep. Bella S. Abzug, D.-N.Y., wants the House to add the privacy commission to its version. Such an amendment, if defeated as expected, would virtually bind House conferees to oppose that part of the Senate bill, in the House-Senate conference where differences between bills passed on each side of the Congress are worked out. The Erlenborn and Abzug proposals provide the key votes on the House side.

The Senate bill, effective one year after enactment, would set the following standards for federal agencies and for data banks established by federal money: (1) collect only relevant personal information and inform the individual which data is required, which data is voluntary, why it is needed and under what authority; (2) maintain and disseminate only timely data, keep track of outside access to the data, establish managerial and physical security; (3) announce the nature of each data bank maintained; (4) grant the individual access to inspect his record and tell each person where the data came from and how it is used; (5) reinvestigate information challenged by an individual, then correct the record or amplify it to include the person's version, and grant a hearing to resolve existing disputes on data.

Federal agencies would have to satisfy the Privacy Commission that new data systems protect privacy and provide security. It is this "privacy


(Continued on page 7)

(Continued from page 6)
impact statement" requirement that incurs the opposition of the Office of Management and Budget, which currently has oversight authority over the planning of federal agencies.

Before sharing information on individuals, each federal agency would have to secure the consent of the individual involved, unless the data is for statistical purposes or the Census. Criminal data banks are covered by the act, except for intelligence and investigative files needed for an imminent prosecution. Sen. Roman L. Hruska, R.-Neb., Administration ally on these matters and the senator without whom Ervin would not expect passage, is holding out for an amendment that would allow confidential sources in law enforcement files to be exempt from disclosure, even after the chances for prosecution had dimmed.

Ervin also included in his bill a requirement that keepers of mail lists in the private sector shall remove an individual's name and address from a list upon request (current practice in most of the industry). Federal mail lists could be sold or rented only with Congressional approval.

The Privacy Protection Commission, Ervin's pet idea, would monitor and inventory government data systems, develop guidelines, publicize violations of the act, and conduct a three-year study of all personal data systems, public and private.

Senate staffers hint that there will be no fight to the death to preserve the commission idea, if the House opposes it.

The House drafters avoided adding an additional bureaucratic layer in the form of a commission and wanted to reserve for Congress the right to study private data banks (possibly by the House Judiciary Committee next spring).

The House bill, which grew out of the Department of Health, Education and Welfare principles developed in early 1973 and refined by Reps. Barry M. Goldwater, Jr., R.-Calif., and Edward I. Koch, D.-N.Y., covers only federal data banks, not those funded by government money. It would be effective in six months.

The House bill includes many of the same access and transfer requirements as the Senate version. It would further allow the Central Intelligence Agency, any law enforcement agency and, to a lesser extent, the Secret Service, to exempt themselves from the act's access and accuracy requirements. The latter agencies would still be restricted in what data could be disclosed to outsiders.

Civil remedies and criminal penalties for abuse are included in each bill. Sen. Ervin's proposal would bar the government from keeping information related to an individual's exercise of First Amendment rights. The House bill of Rep. William Moorhead, D.-Pa., would bar government records "concerning the political or religious belief or activity of any individual" without Congressional approval or individual consent.

The full committee in each house deleted provisions that would have prohibited government or private agencies from collecting an individual's Social Security number without statutory authorizations. Opponents said the requirement would add to the cost of maintaining computerized data, but Sen. Charles

(Continued on page 8)

(Continued from page 7)

H. Percy, R.-Ill., and Rep. Goldwater plan to restore the Social Security number sections.

The argument that privacy adds to the cost of doing business -- or providing government services -- may well cause the privacy proposals trouble in Congress, whether or not the concern is articulated directly or indirectly. Congressional drafters feel they have overcome many of the objections to privacy safeguards in data systems, but one major allegation may still be heard: privacy is inflationary.

## SCHOOL RECORDS

Effective Nov. 19, all federally funded schools and colleges must make student records available for inspection by students 18 or older or by parents and must permit only limited outside access. The privacy requirement (P.L. 93-380, Sec. 513) was tacked on to the 1974 education funding bill by Sen. James L. Buckley, R.-N.Y., without hearings or sustained public debate. College representatives are objecting to the absence of hearings and pressuring Buckley to move to delete or delay the section affecting higher education.

Buckley may be of a mind to do so. Washington lobbyists for higher education, backed by Harvard University's legal counsel, fear that students would see reference letters that had been submitted to colleges in confidence. Advocates of the bill say those letters could easily be destroyed if disclosure would violate confidences. In the end, the debate centers on whether individuals should be protected from themselves.

The amendment was clearly intended to attack elementary and secondary school files, which often are available to everyone -- employers, police, military, and researchers -- except parents and pupils. The Department of Health, Education, and Welfare did not propose the legislation, and so it has thus far been reluctant to establish the necessary enforcement machinery to assure compliance.

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